IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1726

JAMES H. SOUTHARD AND
CLASSIC CAR INVESTMENTS, INC.,
Petitioners

v.

FORBES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH R. MANNING
DAVID W. PORTER
Counsel For Petitioner

MORRIS, MANNING & BROWN
Suite 2150
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 577-6900

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Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on Janurary 17, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Northern District of Georgia, Atlanta Division, granting respondent's motion for a summary judgment is printed in Appendix "C" hereto. The opinion of the Fifth Circuit Court of Appeals, which affirmed the judgment of the District Court for the Northern District of Georgia, is printed in Appendix "B" hereto and has been reported at *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir. 1979).

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals printed in Appendix "B" hereto, was entered on January 17, 1979. On February 16, 1979, the Fifth Circuit Court of Appeals denied petitioner's Petition For Rehearing *En Banc* pursuant to the order printed in Appendix "A" hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Fifth Circuit Court of Appeals has upheld the decision of the District for the Northern District of Georgia, Atlanta Division that petitioners were not entitled under Georgia law to have a jury determine whether the article published by respondent constituted libel by inuendo. The questions presented are:

Where an article is susceptible of two interpretations,

1. Were the petitioners wrongfully denied their right under the law of Georgia to have a jury determine the issue of libel by innuendo?

2. Did the decisions of the lower courts infringe upon the right of individual states within the meaning of *Gertz v. Robert Welch, Inc.*?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the First and Seventh Amendments to the United States Constitution. The statute involved is Georgia Code Annotated §105-701. These provisions are printed in Appendix "D" hereto.

STATEMENT OF THE CASE

Petitioners James H. Southard ("Southard"), an individual, and Classic Car Investments, Inc. ("Classic"), are seeking recovery for damages suffered as a result of an article published in the July 15, 1974 issue of Forbes Magazine which was owned by respondent Forbes, Inc. ('-'Forbes"). A copy of the article is printed in Appendix "E". Petitioners also sought recovery for damages suffered as a result of subsequent republications of the article by Respondent Forbes.

Upon a Motion For Summary Judgment filed by respondent, the district court granted said motion finding as a matter of law that:

(1) the article was not defamatory;

(2) petitioners were not entitled to have a jury determine whether they had been libeled by innuendo; and

(3) respondent's publication was protected by the privilege of "fair comment".

The district court found it unnecessary to determine whether either of the petitioners were public figures within the meaning of *New York Times v. Sullivan*, 374 U.S. 254 (1964), or whether any error in the article was the result of negligence or actual malice.

Petitioners contended at the district court level that the article constituted libel per se and that it was highly defamatory of them in reference to their business trade and profession. Even if the article did not constitute libel per se, under the clear dictates of the law of Georgia, petitioners contended they were entitled to have a jury determine whether the publication was capable of a defamatory meaning.

The Fifth Circuit Court of Appeals, on January 17, 1979, in a split decision, affirmed the holding of the district court. The majority accepted the decision of the district court which held that the article was not defamatory

of the petitioners as a matter of law. The majority also held that the article did not constitute libel by innuendo and that the petitioners were not entitled to have a jury determine this issue. Justice Thornberry dissented, finding that since the article had two reasonable readings, the non-defamatory one set forth by the majority and the defamatory one suggested by petitioners, a jury question was presented. Therefore, he reasoned that summary judgment was an inappropriate method of determining the validity of the petitioners' claim. The dissent noted that the majority did admit that the last sentence of the article was "clearly capable of a defamatory meaning". Justice Thornberry disagreed with the majority that the inference of illegal conduct was negated by any disclaimer in the article.

On February 16, 1979, the motion for rehearing of the petitioners was denied by the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it severely infringes upon the petitioner's constitutional right to a jury trial. Furthermore, the decision below is in direct conflict with the well-established law in the State of Georgia and with the intent and purpose of the decision of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). If not reversed, the decisions of both the district court and the Court of Appeals conflict with the decision of this Court in the *Gertz* case by making it impossible for a plaintiff to recover for a defamatory publication which is not libelous per se and by infringing upon the right of the individual states to set certain standards in libel cases. It is petitioners' contention that the lower courts erroneously resolved these important questions or in a manner which conflicts with decisions of this Court.

Furthermore, this case presents the Court with the opportunity to resolve an issue specifically not addressed in *Gertz v. Robert Welch, Inc.* That issue is whether or not

the states are free to define for themselves the appropriate standard of liability for a defamatory publication which may not be defamatory on its face.

I. The Decision Of The Fifth Circuit Court Of Appeals Is In Violation Of The Law Of Georgia And Seriously Infringes Upon The Petitioners' Right To A Jury Trial.

The article published by Respondent Forbes in its July 15, 1974 issue and printed in Appendix "E" was defamatory of the petitioners under the definition of libel in Georgia found at Georgia Code Annotated §105-701, *et seq.* If not defamatory per se, the article is capable of a libelous interpretation. To present a jury question under the law of Georgia, the article need not be defamatory on its face but merely capable of two meanings, one defamatory and the other not defamatory. The article falsely accuses the petitioners of violations of securities law by alleging that Petitioner Southard sold investment contracts without proper registration under those securities laws. Secondly, the final sentences of the article libel petitioners by inferring that Petitioner Southard was guilty of illegal conduct, fraud and improper business practices with relation to classic cars. The concluding sentences of the article state:

> "If he made claims like that for stocks, Southard would be in the soup. But there is no Securities and Exchange Commission for classic cars."

As stated by Justice Thornberry in his dissent to the decision of the majority for the Fifth Circuit, the article reasonably can be interpreted to defame the petitioners in that it can be read to accuse petitioners of fraud, improper business practices and illegal conduct.

Under the long-established law in Georgia, a jury, neither the District Court for the Northern District of Georgia nor the Fifth Circuit Court of Appeals, should have made the determination as to the defamatory nature of the article. In denying the petitioners that right, the

lower court decisions conflict with decisions both by the state courts of Georgia and by the Fifth Circuit. In *Hood v. Dun & Bradstreet, Inc.*, 335 F.Supp. 170 (N.D. Ga. 1971), rev'd. on other grounds, 486 F.2d 25 (5th Cir. 1973), cert. den., 415 U.S. 985, (1974), the Fifth Circuit held that, pursuant to Georgia law, while plain and unambiguous words must be construed in their normal and ordinary meaning, ambiguous words may be clarified by reference to the circumstances and thereby constitute libel by innuendo. The Fifth Circuit upheld in *Hood v. Dun & Bradstreet* the long-established rule in Georgia that whether a particular publication is libelous is a question of fact for determination by a jury. That rule was established by the Supreme Court of Georgia in the early case of *Holmes v. Clisby* 118 Ga. 820, 45 S.E. 684 (1903), where the court stated:

> "Whenever a publication is susceptible of two constructions, one of which would make it libelous and the other not, it is for the jury to say whether the words in fact are libelous . . . plaintiff cannot by innuendo draw from a writing a conclusion not justified by the language used, but it is competent for the plaintiff to explain in this way an ambiguous publication, to point out the intention of the author, and to show wherein the effect of the language was to injure his reputation . . . and that rule is that a publication must be construed in the light of all the attending circumstances, the cause and occasion of the publication, and all other extraneous matters will tend to explain the allusion or point out the person in question." 45 S.E. at 685.

Furthermore, in *Central of Georgia Railroad Co. v. Sheftall*, 118 Ga. 865, 45 S.E. 687 (1903), the Supreme Court of Georgia stated:

> "Words which are clearly not defamatory cannot have their natural meaning changed by innuendo. Words which are libelous per se do not need such an innuendo. But between these two extremes are found many expressions which may be ambiguous and the

> real meaning can then be explained by reference to the circumstances. It is for the jury in such instances to say whether, in view of all the facts, the writing was libelous." 45 S.E. at 688.

Both the courts and the legislature in Georgia clearly allow the petitioners to present the question of libel by innuendo to a jury. The article is reasonably susceptible to a defamatory meaning, one which the Securities and Exchange Commission and Justice Thornberry recognized. The respondent addressed its article to a sophisticated reading audience and petitioners should be allowed to present their case to a jury for resolution.

II. The Decision Of The Fifth Circuit Court Of Appeals That Petitioners Were Not Entitled To A Jury Trial On The Issue Of Libel By Innuendo Conflicts With The Decision Of This Court In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

This Court clearly felt in the *Gertz* case that the delicate balance between the freedom of the press to engage in free speech and the rights of individuals to protect their good name was in need of correction. Prior to the *Gertz* decision, the press had been given near immunity from any liability for defamatory publication. Therefore, this Court attempted in *Gertz* to give individuals the opportunity to recover for damages done to their reputation as a result of defamatory publications. Unless this Court reviews the decision of the lower courts in this case, the effect of the *Gertz* decision will be non-existent as to publications which are not libelous per se. The lower courts' decisions take away the right guaranteed by the Constitution of the United States of a plaintiff to a jury trial in a civil case. Effectively, the opinions rendered by the district court and the Fifth Circuit mean that, in a libel action, the publication must be defamatory per se; if not, a plaintiff cannot obtain a jury trial by his peers. If allowed to stand, the lower courts' decisions would abrogate the doctrine of libel by innuendo since the publication in question in this case was clearly susceptible of a defamatory meaning yet

the petitioners were denied the right to have a jury decide that question.

In adopting the rule that a plaintiff in a libel case is entitled to a jury trial on the issue of libel by innuendo, the courts of Georgia have merely recognized the legitimate state interest in protecting the reputation of individuals from damage inflicted by libelous publications, a right recognized by this Court in *Gertz*. Mr. Justice Stewart stated that the individual's right to the protection of his own good name

> ". . . reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 92-93 (1963).

This Court cited with approval the above statement of principle in *Gertz*. It was this interest in the reputation of individuals that prompted the Georgia courts to allow a jury trial where a libel by innuendo has been published.

The Court did not address the specific issue raised by this case when it decided the *Gertz* case. The Court, in *Gertz*, granted the states more latitude to set appropriate standards where a publication which was libelous per se was involved. However, the Court did not address the situation where the publication, while reasonably capable of a defamatory interpretation, did not constitute libel per se. As the Court stated at 418 U.S. 349:

> "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content does not warn a reasonably prudent editor or broadcaster of its defamatory potential . . . Such a case is not now before us, and we intimate no view as to its proper resolution."

This case presents the Court with the situation referred to in *Gertz* and is a proper case in which to resolve this issue. Clearly, a reasonable interpretation of the final paragraph of the article is that petitioners were selling investment contracts in violation of the Federal Securities Law, were engaging in unethical and illegal conduct and were guilty of improper business practices. In granting the motion for summary judgment of the respondent, the trial court took from petitioners their right to a jury trial guaranteed under both Georgia law and the Constitution of the United States. In so doing, the district court made it impossible for plaintiff to recover in Georgia for a defamatory publication unless the publication was libelous per se. That decision was erroneous, directly contravenes well-settled Georgia law and ignored the clear intent of this Court in the *Gertz* case. Furthermore, it unnecessarily infringes upon the latitude given the states to fashion a sufficient remedy to protect the reputation of individuals from libelous publications.

The questions presented by this case are of great importance in the continuing attempt to balance the rights of a free press and individual reputations. Finally, this case presents this Court with the opportunity to resolve the issue left undecided in the *Gertz* case as to the freedom of the states to determine appropriate standards when the publication is not defamatory on its face.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition For Writ of Certiorari should be granted.

MORRIS, MANNING & BROWN

BY: _____
JOSEPH R. MANNING

BY: David W. Porter
DAVID W. PORTER

Suite 2150
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404)577-6900

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit on counsel for the other party herein by depositing same in the United States mail with postage fully prepaid and properly addressed as follows:

MR. KIRK MCALPIN
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303

MR. C. DAVID VAUGHAN
Vaughan & Butters
909 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303

MR. TENNYSON SCHAD
Attorney at Law
575 Madison Avenue
New York, New York 10022

This the 2nd day of May, 1979.

JOSEPH R. MANNING

APPENDIX "A"

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
February 16, 1979

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-3076 — JAMES H. SOUTHARD and CLASSIC CAR INVESTMENTS, INC., v. FORBES, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Sadie Hayward
Deputy Clerk

cc:Mr. Joseph R. Manning
Mr. Kirk M. McAlpin
Mr. Tennyson Schad
Mr. C. David Vaughan

APPENDIX "B"

James H. SOUTHARD and Classic Car Investments, Inc., Plaintiffs-Appellants,

v.

FORBES, INC., Defendent-Appellee.

No. 77-3076.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1979.

Rehearing and Rehearing En Banc.

Denied Feb. 16, 1979.

Dealer in antique automobiles and antique automobile investment corporation brought libel action on basis of article about plaintiffs' line of business in defendant's business magazine. The United States District Court for the Northern District of Georgia, William C. O'Kelley, J., rendered summary judgment for defendant, and plaintiff appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) article, which stated that dealer was readying investment programs in classic cars for profit-sharing and pension plans, which misquoted dealer as to guarantees of a large return on classic car investments, which stated that if dealer made similar claims for stocks he would be "in the soup" and that there is no Securities Exchange Commission for classic cars, was neither defamatory on its face under Georgia law, nor capable of defamation by innuendo, and (2) summary judgment is appropriate in a defamation action on issue of whether there is defamation.

Affirmed.

Brown, Chief Judge, filed concurring statement.

Thornberry, Circuit Judge, dissented and filed opinion.

1. Libel and Slander 33
A publication which on its face is necessarily within scope of Georgia statute defining libel and slander is considered defamatory per se. Code Ga. §§ 105-701 to 105-703.

2. Libel and Slander 123(2)
Under Georgia law, it is for the court, on appropriate motion, initially to determine whether the publication at issue is defamatory as a matter of law.
Code Ga. §§ 105-701 to 105-703.

3. Libel and Slander 123(2)
If as a matter of law a publication is not defamatory, Georgia law requires that the case be dismissed but if the publication is defamatory per se the jury is to be instructed accordingly. Code Ga. §§ 105-701 to 105-703.

4. Libel and Slander 123(2).
If a publication has no necessarily defamatory meaning, but can be understood in more than one way, one of which is defamatory, Georgia law holds that it is for the jury to decide if on the basis of some innuendo resulting from the circumstances surrounding the publication the publication in fact had that defamatory meaning. Code Ga. §§ 105-701 to 105-703.

5. Libel and Slander 123(2)
Georgia distinctions between libel per se and libel by innuendo do not affect a court's initial task of determining whether the publication is capable of defamatory meaning. Code Ga. §§ 105-701 to 105-703.

6. Libel and Slander 9(1)
Under Georgia law, investment article, which appeared in business magazine, which discussed investment in antique automobiles, which stated that plaintiff dealer was readying investment programs for profit-sharing and pension plans, which stated that if plaintiff made similar claims for stocks he would be "in the soup" and that there is no Securities Exchange Commission for classic cars was neither defamatory on

its face nor subject to defamation by innuendo, notwithstanding that it misquoted dealer as to guarantees of large returns on classic car investment or that fundamental message was caveat emptor to potential customers of dealer and his investment corporation. Code Ga. §§ 105-701 to 105-703.

7. Libel and Slander 9(1)

Unfavorable commercial publicity, as such, is not defamation under Georgia law. Code Ga. §§ 105-701 to 105-703.

8. Federal Civil Procedure 2515

For summary judgment purposes, a careful look at whether an eventual jury verdict could stand is especially appropriate in libel actions, because the very pendency of a lawsuit may exert chilling effect which governing case law seeks to guard against.

9. Federal Civil Procedure 2515

Issue of actual malice in a public figure lawsuit lends itself to summary judgment since action must be shown with convincing clarity.

10. Federal Civil Procedure 2515

Summary judgment is appropriate on issue whether there is defamation.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

TUTTLE, Circuit Judge:

James H. Southard, a dealer in antique automobiles and chairman of the board and principal stockholder of plaintiff Classic Car Investments, Inc. ("Classic"), brought this libel suit on the basis of an article about the plaintiffs' line of business in *Forbes* magazine, published by the defendant

Forbes, Inc. ("Forbes"). The district court granted the defendant's motion for summary judgment, ruling that the article was not defamatory of the plaintiffs and was protected by the privilege of fair comment. We affirm.

In its July 15, 1974, issue *Forbes* published an article entitled "Degradation of a Hobby." The article was written by Alvin A. Butkus, a regular *Forbes* writer with ten years' experience, as part of a series which the magazine publishes dealing with the investment aspects of "collectibles," items such as artwork that generally have interested collectors rather than investors.

The article discussed the growing field of investment in "classic," or antique, cars. It was clearly critical of speculators and promoters in this field, whom it called "the quick buck boys." The subheading of the article stated: "Want to be the first on your block to get burned in the latest speculative craze? Then get yourself an 'old' car." The gist of the article was to question the certainty of enormous appreciation in the value of old cars claimed by some of the promoters of the investment, and to warn would-be investors of some of the pitfalls of such investments.

The article included a chart, headed "Hottest Cars Around," illustrating some of the most dramatic instances of appreciation in value of old cars and including projections of future prices. A fine print footnote to the chart attributed as the source of the information it contained "Old Car Value Guides and Classic Car Investments." In fact, Classic did not furnish all of the future price estimates and the chart did not include the quality rating criteria used in the antique car industry to rate prices.

The final paragraph of the article discussed Southard:

> How far can the craze go? Who can say? The Dutch tulip bulb mania in the 17th century was the prototype of such irrational booms. Some professionals are already licking their chops over prospects for the next round of higher prices. Jim Southard, a former Atlanta

> stockbroker turned auto collector-dealer, is readying investment programs in classic cars for profit-sharing and pension plans. His strategy is to sell such programs to groups of doctors, lawyers and corporations. They will get the appreciating value of the car and he will get a management fee and possibly even storage fees. "Investing in cars is just like buying stocks, except you don't have the downside risk," argues Southard. "You buy the highest quality, where demand is greatest and supply is small. The value of those cars never goes down, so you're guaranteed to make money." If he made claims like that for stocks, Southard would be in the soup. But there is no Securities & Exchange Commission for classic cars.

The quotations attributed to Southard in this paragraph were not verbatim quotes but a "distillation" of comments he made to reporter Butkus. Butkus' transcript and notes showed that Southard used similar, but less emphatic, language.[1]

The day after this article appeared, the Securities and Exchange Commission, prompted by the article, began an informal inquiry to determine whether Southard and Classic were selling unregistered securities in violation of federal securities law. The inquiry led to no formal SEC action.[2]

Southard and Classic filed suit for defamation against Forbes in the United States District Court for the Northern District of Georgia. They alleged that the article was libelous because it charged antique car dealers in general with unethical

1. The transcript showed that he said: "And this knowledge, again, knowledge, the same thing I was taught for years in the stock market. . . . Basically the same thing, only in this type of thing you don't have the downside that you've got in the market." Butkus' notes read: "Buy quality—price bonded [sic] to go up—so make money. Can't be made again. . . . Buy quality—bound to make money."

2. The precise reasons for which the SEC initiated and then terminated its inquiry are not clear, since the SEC did not disclose information in this respect pursuant to the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. § 552(b)(5).

business practices, and Southard and Classic in particular with violations of federal securities law or with unethical business practices. Following substantial discovery, the district court granted the defendant's motion for summary judgment. The court ruled that as a matter of Georgia law nothing in the article was defamatory of either plaintiff, and that the misquotations of Southard were privileged under the doctrine of fair comment.

Both parties agree that Georgia law governs this case. Georgia law defines libel as a publication "tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule . . . ." Ga. Code Ann. §§ 105-701, 703.[3] Although part of the definition of slander, a charge "made against another in reference to his trade, office, or profession" which is "calculated to injure him therein" also gives rise to a libel action. Ga. Code Ann § 105-702.[4]

[1-4] A publication which on its face is necessarily within these statutory definitions is considered libelous per se. *Holmes v. Clisby*, 118 Ga. 820, 822, 45 S.E. 684 (1903) (predecessor statute). It is for the court, upon appropriate motion, initially to determine whether the publication at issue is defamatory as a matter of law. If as a matter of law the publication is not

3. Ga. Code Ann. § 105-701 provides:

> A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery.

Ga. Code Ann. § 105-703 provides:

> Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel, the publication of such libelous matter being essential to recovery.

4. Ga. Code Ann. § 105-702 provides in pertinent part:

> Slander, or oral defamation, consists, . . . third, in charges made against another in reference to his trade, office, or profession, calculated to injure him therein; . . . damage is inferred.

defamatory, the case must be dismissed. *Garland v. State*, 211 Ga. 44, 46, 84 S.E.2d 9 (1954). If the publication is defamatory per se, the jury is instructed accordingly. *Weatherholt v. Howard*, 143 Ga. 41, 42, 84 S.E. 119 (1915). If the publication has no necessarily defamatory meaning, but can be understood in more than one way, one of which is defamatory, then it is for the jury to decide if on the basis of some innuendo resulting from the circumstances surrounding the publication the publication in fact had that defamatory meaning. *Holmes v. Clisby, supra*, 118 Ga. at 822-23, 45 S.E. at 685-86; *Sheley v. Southeastern Newspapers, Inc.*, 87 Ga. App. 167, 171, 73 S.E.2d 211 (1952) and cases cited therein.

[5] These distinctions between libel per se and libel by innuendo do not affect the court's initial task of determining whether the publication is capable of defamatory meaning. Accordingly, the essential question before us in reviewing the grant of summary judgment in this case is whether the publication in *Forbes* is reasonably capable of some meaning defamatory of James Southard or Classic Car Investments, Inc. In considering this question, we must construe the publication "as a whole . . . in [its] plain, natural, and ordinary meaning, . . . as other people would understand [it], according to the sense in which [it] appear[s] to have been published and the idea [it was] meant to convey." *Garland v. State, supra*, 211 Ga. at 46, 84 S.E.2d at 11.

The appellants urge that the *Forbes* article defamed them because it charged them with illegal activities, namely violation of federal securities laws. The crux of their argument is that the statements in the article that Southard was "readying investment programs in classic cars for profit-sharing and pension plans" in which investors "will get the appreciating value of the car and [Southard] will get a management fee and possibly even storage fees" charged him with the sale of "investment contracts." Since the willful sale of an unregistered security is unlawful,[5] and "security" includes an "investment contract,"[6]

5. 15 U.S.C. § 77e(c).

6. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

the appellants argue, the effect of this charge was to impute to Southard the unlawful sale of a security. They contend that this charge was reinforced by final sentences of the article: "If he made claims like that for stocks, Southard would be in the soup. But there is no S.E.C. for classic cars."

[6, 7] The district court correctly found that nothing on the face of the article explicitly accuses Southard of violating federal securities law. Nor do the activities explicitly attributed to Southard on their face make out the elements of a securities law violation. Thus, we cannot accept that the article was defamatory of Southard and Classic Car Investments as a matter of law.

The appellants contend that even if the article is not defamatory on its face, the article as a whole nevertheless can be understood as implying violation of securities law or at least unethical business conduct. They argue that, to a reading audience as sophisticated in business affairs as *Forbes*', "investment program" plus "management fees" equals investment contracts. In the context of the misquoted guarantees of a large return on classic car investments, the omission of the rating system in the price chart, the article's derogatory attitude towards the claims of classic car dealers in general, and the article's comment that Southard's statements would put him "in the soup" if he were selling stocks, this equation would lead the reader to conclude that he was selling unregistered securities. As evidence of this implication, the appellants point to the S.E.C. inquiry that followed the publication of the article. They also introduced the affidavit of Thomas Sherrard, a professor of corporate and securities law, who stated that he interpreted the article as implying that Southard was selling unregistered securities. Accordingly, the appellants maintain that the *Forbes* article was capable of defamatory interpretation, and the district court erred in granting summary judgment because the appellant should have had the opportunity to have a jury determine if in fact the defamatory interpretation should be placed upon the article.

The meaning which the appellants urge as a basis for denying summary judgment goes beyond that which the ordinary

reader of *Forbes* would place on the article. It requires too attenuated a series of inferences: the reader would have to conclude first that the sale of antique autos as part of an investment program in which the seller would receive management fees was a sale within the legal definition of a security; then that this security was unregistered; and finally that the violation of securities law was willful. We are not satisfied that the inferences drawn by legal experts in securities law show that an audience as undoubtedly sophisticated in securities transactions as *Forbes'* reasonably would draw the same conclusion much less the "person of ordinary capability"[7] would do so.

While the statement that Southard would be "in the soup" is clearly capable of defamatory meaning, that statement was conditioned on Southard's selling stocks and thus coming within SEC purview. The article then said: "There is no SEC for classic cars." As the appellants conceded at oral argument, the latter language explicitly takes Southard out of "the soup," negating the implication that Southard's activities or statements were unlawful. The appellants thus seek by the innuendo they claim to impart to the *Forbes* article a meaning which the article itself denies. But, words which are not defamatory "cannot have their natural meaning enlarged by innuendo." *Central of Ga. Rwy. Co. v. Sheftall*, 118 Ga. 865, 867, 45 S.E. 687, 689 (1903). "The purpose of innuendo is to explain ambiguities in the charge made in the statement, and cannot introduce any new matter." *Garland v. State*, 211 Ga. 44, 46, 84 S.E.2d 9, 11 (1954).

We find that the *Forbes* article, in its ordinary and natural meaning reasonably can be understood as suggesting at worst that Southard and other classic car dealers were puffing the value of investment in classic cars to an extent beyond that permitted in the marketing of securities; that this puffing was exploitative; and that some SEC-like regulation perhaps should intervene against such puffery. The fundamental message was caveat emptor to potential customers of Southard and others in his business.

7. *Southeastern Newspapers, Inc. v. Walker*, 76 Ga. App. 57, 60, 44 S.E.2d 697 (1947) *quoting Little v. Barlow*, 26 Ga. 423, 425, 71 Am. Dec. 219, 220 (1858).

This caveat undoubtedly was unfavorable publicity for Southard, but unfavorable commercial publicity as such is not defamation. "[I]t lacks the element of personal disgrace necessary for defamation." W. Prosser, *Handbook of the Law of Torts*, § 111 at 740 (4th ed. 1971). It does not amount to a publication which tends to expose Southard and Classic "to public hatred, contempt, or ridicule . . .," as required by Ga. Code Ann §§ 105-701, 703. Nor does it charge Southard with activities incompatible with the proper exercise of Southard's business. The publication was therefore not "calculated to injure him" in his trade, as required by Ga. Code Ann. § 105-702.[8] We hold as a matter of law that this publication was not capable of a meaning defamatory of Southard or of Classic Car Investments, Inc.[9]

8. *Cf. Hood v. Dun & Bradstreet, Inc.* 335 F.Supp. 170, 177 (N.D. Ga. 1971) (allegations of doubtful creditworthiness not per se incompatible with proper exercise of contractor's business and to that extent not defamatory), *rev'd on other grounds*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985, 94 S.Ct. 1580, 39 L.Ed.2d 882 (1974).

9. The district court considered the article's references to each of the plaintiffs separately. With respect to Classic Car Investments, the court considered only the effect of the attribution to Classic as the source for the chart showing various instances of appreciation in the value of classic cars because there was no mention of Classic in the text of the article. The court concluded that even if this attribution or the concomitant omission of the point rating system for antique cars was a misrepresentation, the misrepresentation did not rise to the level of defamation within the meaning of Ga. Code Ann. § 105-701. The district court also ruled that it is "well-settled" that Classic would not be defamed vicariously by references to Southard, one of its officers, or to the industry of which the company is a part.

Although Classic Car Investments, Inc., appeals from the district court's ruling, the appellant's brief does not challenge these rulings concerning Classic. In any case, we need not address ourselves to these rulings because if the *Forbes* article was not defamatory of Southard, a fortiori it was not defamatory of Classic.

The district court also issued a secondary ruling that the misquotations of Southard's comments concerning the reliability of investment in antique cars were protected by the privilege of "fair comment" because they fairly represented what Southard said. In addition to this question of privilege, the parties have argued the question whether Southard was a public figure within the meaning of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) and whether, accordingly, summary judgment was appropriate because there is insufficient evidence that *Forbes'* statements concerning Southard were made with knowing falsehood or reckless disregard of the truth required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Because we find at the threshold that there was no defamation, we need not consider whether either of these privileges against liability apply in this case.

[8] In so deciding, we have the benefit of a record fully developed through affidavits and depositions presented on the defendant's motion for summary judgment. Where there is such a record and it "demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper." *Time, Inc. v. McLaney*, 406 F.2d 565, 572 (5th Cir.), *cert. denied* 395 U.S. 922, 89 S.Ct. 1776, 23 L.Ed.2d 239 (1969). We bear in mind that a careful look at whether an eventual jury verdict could stand is especially appropriate in libel actions, because the very pendency of a lawsuit may exert the chilling effect which *New York Times Co. v. Sullivan*[10] and its progeny seek to guard against. *Bon Air Hotel, Inc. v. Time, Inc.* 426 F.2d 858, 865 (5th Cir. 1970); *Time, Inc. v. McLaney, supra*, 406 F.2d at 566; *Thompson v. Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F.2d 774, 776, *cert. denied* 393 U.S. 884, 89 S.Ct. 194, 21 L.Ed.2d 160 (1968).

[9, 10] Our approval of the use of summary judgment in libel cases has come where judgment has been granted on the issue of "actual malice" as defined in *New York Times Co. v. Sullivan*,[11] an issue which lends itself to summary judgment because actual malice must be shown with "convincing clarity," *New York Times Co. v. Sullivan, supra*, 376 U.S. at 285-86, 84 S.Ct. 710. Summary judgment is equally appropriate on the issue whether there is defamation. The protective rationale for summary judgment in libel cases remains the same no matter what the issue on which judgment is granted. Moreover, where no "substantial danger to reputation is apparent"[12] the press should be more carefully guarded against exposure to liability for defamation than where clearly

10. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

11. *See, e.g., Bon Air Hotel, supra*, 426 F.2d at 864.

12. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967).

defamatory content warns it of liability. *See Gertz v. Robert Welch, Inc.* 418 U.S. 323, 348, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974). Too broad a definition of defamation may curtail "uninhibited, robust and wide-open"[13] discussion as much as may too low a standard of proof.

For these reasons, we hold that the district court did not err in granting Forbes, Inc.'s motion for summary judgment.

The judgment is AFFIRMED.

JOHN R. BROWN, Chief Judge, concurring:

I concur in the result and all of the opinion save that I disavow the implication in the concluding portion that the *Times-Sullivan* First Amendment protection justifies or compels summary judgment for the media where, on the usual accepted principles, it might otherwise fail.

THORNBERRY, Circuit Judge, dissenting:

It is with great reluctance that I dissent from an opinion of a majority as esteemed as the one in this case. I am compelled, however, to register my dissent because I believe there is a jury question presented whether the *Forbes* article is capable of a defamatory meaning. To support my position, I need not demonstrate that the article is defamatory: I need only show that the article is capable of two meanings, one defamatory and the other not defamatory.

Southard has presented this court with a plethora of theories why this article is defamatory. Most of his arguments can be dismissed out of hand and the court properly does so. He presents two, however, that are at least colorable. His first theory suggests that the article falsely accuses him of securities law violations in that Southard sold investment contracts without the proper registration. I agree with Judge Tuttle that this theory is strained and simply requires inferences that are too sophisticated for the average *Forbes* reader.

13. *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270, 84 S.Ct. 720.

Southard's second argument, however, I believe, presents a jury question. Essentially, this theory is based upon the concluding sentences in the article: "If he made claims like that for stocks, Southard would be in the soup. But there is no Securities & Exchange Commission for classic cars."

The majority states that this statement is "clearly capable of defamatory meaning." At 144. But the majority states that since the second sentence explicitly takes Southard "out of the soup" any implications that Southard was guilty of illegal conduct is negated. I disagree. The second sentence does not negate the inference that Southard is guilty of illegal conduct. It negates the inference that the SEC can do something about it. In effect, the article can be read as accusing Southard of improper business practices, albeit practices outside the jurisdiction of the SEC.

I would not be surprised to find that the public associates the work of the SEC with stock fraud.[1] Given this inference, I think Southard should be allowed to argue to a jury that the *Forbes* article accuses him of fraud or improper business practice with relation to classic cars, but that the traditional guardian against fraudulent business activities is without power to do anything about it because Southard's fraud is outside the jurisdiction of the SEC.

Because I think the article has two reasonable readings—the non-defamatory one posited by Judge Tuttle and the defamatory one suggested by myself—I think a jury question is presented and summary judgment is inappropriate.[2] I reach this conclusion notwithstanding my agreement with the standard by which we consider the grant of summary judgment in libel cases as stated by Judge Tuttle.

Since I have made these comments under the protective luxury of a dissent, I need not speculate about Southard's status as a plaintiff nor his ability to prove *Forbes* guilty of actual malice, if Southard is a public figure.

1. In *Orr v. Argus-Press*, 586 F. 2d 1108 (6 Cir. 1978), the Sixth Circuit was faced with a defamation case in which the plaintiff had been charged with various securities law violations. A newspaper article had described these charges as "fraud." The Sixth Circuit held that the "word 'fraud' . . . is both accurate and appropriate to describe a violation of Michigan's securities laws."

2. For a similar uncomplimentary article in the financial press, *see Reliance Insurance Co. v. Barrons*, 422 F.Supp. 1341, 1345 (S.D.N.Y. 1977).

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APPENDIX "C"

JUDGMENT ON DECISION BY THE COURTCIV 32 (7-63)

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF GEORGIA — ATLANTA DIVISION

CIVIL ACTION FILE NO. C74-1984A

JAMES H. SOUTHARD and CLASSIC CAR INVESTMENTS, INC.

vs.

FORBES, INC.

JUDGMENT

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and the defendant FORBES, INC., recover of the plaintiff JAMES H. SOUTHERD [SIC] and CLASSIC CAR INVESTMENTS, INC., its costs of action.

Dated at ATLANTA, GEORGIA, this 21st day of September, 1977.

FILED AND ENTERED
in Clerk's Office this
September 21, 1977
Ben H. Carter, Clerk
BY /s/ Sheila Sewell
Sheila Sewell
Deputy Clerk

BEH H. CARTER
Clerk of Court

BY /s/ Sheila Sewell
Sheila Sewell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES H. SOUTHARD and CLASSIC
CAR INVESTMENTS, INC.

vs.

FORBES, INC. CIVIL NO. C74-1984A

ORDER

This civil action is before the court on motion of defendant *Forbes Magazine* for summary judgment. The present litigation was precipitated by an article of July 15, 1974, in *Forbes Magazine* entitled "Degradation of a Hobby." As one of a number of *Forbes* articles exploring novel modes of investment, the article in question discussed investment for profit in antique or classic cars, the collection of which was formerly a hobby for the wealthy. The tone of the article was clearly critical of speculators, the "quick-buck boys," and warned the uninitiated against acquiring cars in expectation of enormous appreciation in value. Plaintiffs are James Southard, a dealer in classic cars, and Classic Car Investments, Inc., a corporation dealing in classic cars, of which plaintiff Southard owns 50% of the stock. Plaintiffs brought this action for defamation on the basis of the final paragraph of the *Forbes* article.[1] At

1. "How far can the craze go? Who can say? The Dutch tulip bulb mania in the 17th century was the prototype of such irrational booms. Some professionals are already licking their chops over prospects for the next round of higher prices. Jim Southard, a former Atlanta stockbroker turned auto collector-dealer, is readying investment programs in classic cars for profit-sharing and pension plans. His strategy is to sell such programs to groups of doctors, lawyers and corporations. They will get the appreciating value of the car and he will get a management fee and possibly even storage fees. 'Investment in cars is just like buying stocks, except you don't have the downside risk,' argues Southard. 'You buy the highest quality, where demand is greatest and supply is small. The value of those cars never goes down, so you're guaranteed to make money.' If he made claims like that for stocks, Southard would be in the soup. But there is no Securities & Exchange Commission for classic cars."

oral argument plaintiffs narrowed their claim that certain portions of the article were defamatory to (1) that portion which refers to Southard's readying investment programs in classic cars for pension and profit-sharing plans; (2) the reference to management fees which he expected to obtain; (3) the direct quotes in the final paragraph; and (4) the last two sentences of the final paragraph: "If he made claims like these for stocks, Southard would be in the soup. But there is no Securities and Exchange Commission for classic cars." Plaintiff Southard claims that he never indicated that he was planning investment programs for pension and profit-sharing plans, that he never stated that he contemplated receiving a management fee for managing such plans, that he never made the direct quotes attributed to him, and that the last two sentences of the article amount to an accusation of unethical business practice and perhaps even a crime. Plaintiff Southard also complains that the general tone of the article is very critical of dealers in antique cars and that since he was the only dealer mentioned by name in the article, any derogatory remarks about dealers in general were aimed at him.

The corporate plaintiff, Classic Car Investments, Inc., claims that it was defamed in that a price chart in the article, which listed Classic Car Investments, Inc., as one of the sources for the chart, failed to make clear that the prices were based on the value of a car which rated 90 points on a point scale by which cars are rated as to mechanical condition, maintenance, and physical appearance. The corporate plaintiff further contends that it was defamed through the defamation of its officer and stockholder, Southard.

Defendant's motion for summary judgment is based on a contention that there was no defamation, either per se or by innuendo, that any variation from the exact words of plaintiff Southard was within the purview of the fair comment privilege, and, finally, that since Jim Southard is a public figure within the meaning of *Gertz v. Robert Welsh* [SIC], *Inc.*, 418 U.S. 323 (1974), there can be no liability for the publication in the absence of actual malice.

After careful consideration of the evidence presented, the court has concluded that there can be no liability because there was no defamation. That there was no defamation of the cor-

porate plaintiff is obvious from the article complained of. The corporate plaintiff is not mentioned in the text of the article at all. There is what amounts to a credit given to Classic Car Investments in fine print below a price chart. Plaintiffs complain that this chart is a misrepresentation in itself in that it did not indicate that the prices referred to cars to which 90 "points" had been assigned without any explanation of the "point" scheme. Even if this omission were sufficient to constitute a misrepresentation, the court would find no defamation. The footnote in no way indicates that the chart was prepared by Classic Car Investments or that Classic Car Investments was in any way responsible for the chart. The chart merely indicates that Classic Car Investments was the source of some information used in preparing the chart. If the chart is misleading or inaccurate, there is no reason to believe that the average reader would attribute this to Classic Car Investments in a way that would tend to expose Classic Car Investments to public hatred, contempt, or ridicule within the meaning of Ga. Code Ann. § 105-701. It is, further, well settled that a corporation cannot be defamed through a mention of an officer of the corporation, *Memphis Telephone Co. v. Cumberland Telephone & Telegraph Co.*, 145 F. 904 (6th Cir. 1906), or through references to an industry in general. *Fowler v. Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir. 1950); *Ajay Nutrition Foods, Inc. v. FDA*, 378 F. Supp. 210 (D.N.J. 1974), *aff'd*, 513 F.2d 625 (3d Cir. 1975). Accordingly, summary judgment is appropriate in favor of defendant and against the corporate plaintiff.

The question of defamation of the individual plaintiff, Southard, is more complex. Southard contends that the criticism of dealers in general in the article constitutes a defamation of him as an individual since he was the only dealer mentioned by name. Just as general references to an industry cannot defame a corporation which is a member of that industry, general references to antique automobile dealers cannot be regarded as defamatory references to a particular dealer.

Plaintiff Southard next contends that the statement in the article that he is readying investment programs for pension and profit-sharing plans is untrue. Mr. Southard's insistence

that this statement is untrue is belied by a letter which he wrote to *Forbes* objecting to the article. In this letter of July 9, 1974, he clearly states that he is in the process of developing investment plans. Further, defendant shows the court that plaintiff Southard's own advertising contradicts his assertion that the statement in regard to investment plans is untrue. Inasmuch as truth presents an absolute defense to a charge of libel or slander in Georgia, Ga. Code Ann. § 105-708, there was no defamation in the reference to plaintiff's developing investment plans in classic or antique cars for use in pension or profit-sharing plans.

Plaintiff Southard complains of three other portions of the final paragraph of the article as libelous. These three objections when considered together constitute the most serious allegation that the article was defamatory and should, therefore, be analyzed in relation to one another. The article indicates that Southard intended to earn management fees and perhaps storage fees in connection with the investment plans which he was developing for sale to groups of doctors, lawyers, and corporations. Following this statement about management and storage fees are two purportedly direct quotes from plaintiff: "Investing in cars is just like buying stocks, except you don't have the downside risk." "You buy the highest quality, where demand is greatest and supply is small. The value of those cars never goes down, so you're guaranteed to make money." Plaintiff insists that he never made the above statements. Finally, plaintiff contends that the final two sentences of the article are defamatory: "If he made claims like that for stocks, Southard would be in the soup. But there is no Securities and Exchange Commission for classic cars." Forbes insists that the last two sentences add up to nothing more serious than an indication that Southard tends to engage in puffing and that an investor would be wise to refrain from taking his claims literally.

Southard, on the other hand, contends that the statement about the management fees is false, that the purported direct quotes are not his statements, and that the combination of investment plan plus management fees adds up to an implication that he is engaging in the sale of unregistered *investment contracts* within the meaning of *SEC v. W.J. Howie Co.*, 328 U.S.

293 (1946). Consequently, according to Southard's reasoning, the last two sentences are in fact an accusation of securities violations. As further proof that this is the clear meaning of the last paragraph of the article, Southard points out that immediately following publication of the *Forbes* article the SEC *did*, in fact, investigate his business.

Under the law of Georgia, a statement which is clear and unambiguous on its face cannot be the basis of libel by innuendo. Only if a writing is subject to more than one interpretation may the plaintiff, by showing the intent of the author, endeavor to draw by innuendo a libelous conclusion not justified by the words used. *DeLoach v. Maurer*, 130 Ga. App. 824, 826-27 (1974). On its face the following statement, "They [the persons to whom plaintiff planned to sell investment programs in antique or classic cars] will get the appreciating value of the car and he will get a management fee and possibly even storage fees" is innocent. Southard contends, however, that by *innuendo* the statement is libelous in that it indicates that he plans to sell investment contracts. As evidence that this is a fair interpretation he cites the SEC investigation launched following publication of the *Forbes* article. The fact that a magazine article leads to an investigation by a government agency is not an indication that the subject of that investigation was libeled. To find otherwise would result in a chilling effect upon the investigative reporting which is essential to a free flow of information in a democratic society. Whether or not the plaintiff ever told Alvin Butkus, the author of the article, that he planned to collect management fees from buyers of the proposed investment plans, what Southard told Butkus is immaterial because the statement that Southard planned to collect management fees was not defamatory. The statement is clear on its face, and there is no justification for reading into it a defamatory meaning which would in any case mean nothing to a person not versed in the vagaries of securities law.

Southard's next allegation of libel is that not only did he never make the statements in the direct quotes attributed to him but also that he never spoke in such positive terms about risk and profit, his experience as a stockbroker having taught him the danger of speaking in absolutes. Defendant shows the court the interviews with Southard, which are exhibits to the

deposition of Alvin Butkus. Located within these interviews are statements which, if not precisely the same as the direct quotes, indicate that the statements attributed to Southard accurately portray his philosophy if not his precise language.[2] The court finds that while it may be somewhat careless and misleading to place quotation marks around a statement when there is some question as to the exact language used, it is not actionable, and it is, in fact, within the journalistic privilege of fair comment to do so when the statement attributed to the individual is a fair and true report of what was in fact said. *See Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1050 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976). "That the 'quotes' are not word-for-word—indeed they are modified on occasion—nor always complete, does not make them facts not 'truly stated.' " *Id.*

Fair comment, which is the privilege to comment on or criticize the work of another as long as the facts stated are true and the comment does not go beyond the work to attack the author personally, is a privilege usually associated with literary or artistic criticism. However, it is well settled that the privilege is not limited to criticism of published works. *Brinkley v. Fishbein*, 110 F.2d 62 (5th Cir. 1940), involved articles in a medical journal exposing the plaintiff as a "modern medical charlatan." The court concluded that there was a privilege of fair comment involved because "this was a matter of public concern and the articles were published for general information." *Id.* at 64. In a similar case, the fair comment privilege was held to embrace the statement in *The American Rifleman* that plaintiff's rifle device was poorly designed. *Safe Site, Inc. v. National Rifle Association of America*, 253 F. Supp. 418 (D.D.C. 1966). *See also Porcello v. Time, Inc.*, 300 F.2d 162 (7th Circ. 1962).

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2. Excerpts from transcript of conversations with Southard, found in Exhibit #17 to Butkus deposition.
"And this is knowledge, again, knowledge, the same thing I was taught for years in the stock market."
"Basically the same thing, only in this type of thing you don't have the down side that you got in the market."
Excerpts from notes of other interviews with Southard, found in Exhibits #22 and #25 to Butkus deposition: "buy quality—price bonded to go up—so make money. Can't be made again." "buy quality—bound to make money."

Inasmuch as the direct quotes are within the privilege of fair comment and there is no defamation involved in the statements that Southard was readying investment programs for pension and profit-sharing plans for which he intended to collect management and perhaps storage fees, the only remaining objectionable material is contained in the final two sentences of the article. Since the material preceding these sentences has been found to be free of any defamatory taint, it would be illogical to read into these sentences the double meaning that plaintiff would have us find. As defendant argues, the final sentences actually make clear that Southard has *not* violated the securities laws since classic cars are outside SEC regulation. Under Georgia law, these sentences being clear and unambiguous on their face and there being no defamatory material preceding these final observations, there is no justification for extrapolating from them a defamatory meaning not apparent from either the complained of sentences nor the surrounding material. "Although Georgia law clearly contemplates allowing a jury in a libel case to determine the effect of ambiguous language, it does not contemplate submission of the question of liability where no ambiguity appears and the statements are not libelous per se." *Dun & Bradstreet, Inc., v. Miller*, 398 F.2d 218, 223 (5th Cir. 1968). The statement of the court in *Miller* in regard to the report considered in that case would be equally applicable here: "The innuendos charged are so farfetched, forced and strained that we are unable to see any relationship between them and the remaining statements in the report." *Id.*

Inasmuch as the court has found no defamatory meaning in the complained of provisions, there is no need to consider whether the plaintiffs or either of them is a public figure within the meaning of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or whether any error made in the article was the result of negligence or actual malice.

In the absence of a defamation of either the corporate or the individual plaintiff, the defendant is entitled to summary judgment as a matter of law, and defendant's motion is accordingly granted.

IT IS SO ORDERED this day of September, 1977.

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

AMENDMENT I — FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

CODE OF GEORGIA

Book 29

TITLE 105. Torts

Chapters 105-1 through 105-13

105-701. (4428) *Libel defined; necessity of publication.* — A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery.

105-702. (4433) *Slander defined; inference of damage; special damage.* — Slander, or oral defamation, consists, first, in imputing to another a crime punishable by law; or, second, charging him with having some contagious disorder, or being guilty of some debasing act which may exclude him from society; or, third, in charges made against another in reference to his trade, office, or profession, calculated to injure him therein; or, fourth, any disparaging words productive of special damage flowing naturally therefrom. In the last case, the special damage is essential to support the action; in the first three, damage is inferred.

105-703. (4431) *Newspaper libel defined; necessity of publication.* — Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel, the publication of such libelous matter being essential to recovery. (Acts 1893, p. 131.)

APPENDIX "E"

DEGRADATION OF A HOBBY

WANT TO BE THE FIRST ON YOUR BLOCK TO GET BURNED IN THE LATEST SPECULATIVE CRAZE? THEN GET YOURSELF AN "OLD" CAR.

With the stock market in ruins, tax shelters leaking, swindles abounding and inflation speeded up, people reach desperately for things that are likely to retain value. An inevitable result is the spread of speculation into all kinds of things that once were sedate hobbies: coin and stamp collecting; pop art; you name it. Now the speculators and quick-buck boys are moving into "classic" cars.

Two months ago on his Saturday night "Reasoner Report," broadcaster Harry Reasoner covered an auto auction in Atlanta, Ga. at which a 1929 Duesenberg was sold for a record $205,000 Now the self-proclaimed experts claim such rare Duesenbergs — only 488 were built — will be worth around $500,000 in five years. By 1980, a cool $1 million. By such claims and by publicity, the players hope to make their prophecies self-fulfilling. It has happened before.

And Duesenbergs are not even the real cream of the crop. The elephantine Italian-built Bugatti Royale is. Seven were built; only six are known to still exist. The last time one changed hands was in 1966. Reno nightclub owner Bill Harrah, who owns a trove of 1,500 old cars, paid an estimated $50,000 for it. But that was when car-collecting was still a *hobby*. If a Bugatti Royale were put up for sale in today's fevered market, it would bring upwards of $500,000.

Rare cars like these are to car-collecting what Vermeer or Breughel the Elder are to art-collecting. They are not where the real action is; they are too few and too expensive. In car-collecting, the real action is all over the place,

in Nashville and Minneapolis, in Dallas and Los Angeles — wherever there are men who like to play weekend grease monkey, wherever there are people who are turned on by cars but turned off by Detroit's current look-alikes. There are more and more of such people and, with the speculators getting into the act, prices are climbing fast.

"Any post-World War II car up to a '55 is hotter than a fire cracker," snaps Auburn, Ind. auto auctioneer Dean Kruse. "Why, at one recent sale a good '55 Chevy brought $5,000, a '48 Buick sold for $6,800 and a '48 Caddy convertible went for $10,000."

Kruse is the biggest of a new breed of auto auctioneers who are changing this onetime hobby into a business. Until 1970 the only real public market for old cars was newspaper and hobby magazine ads. Then in 1971 three or four classic, antique or old car auctions were held throughout the U.S. This year there will be more than 100 of them, and each is expected to do between several hundred thousand dollars and a million dollars worth of business. Kruse alone plans to sell 3,000 cars, twice as many as he did last year, nearly doubling his volume to around $30 million.

What's behind the commercializing of this typically American hobby? Greed, of course; dealers and auctioneers stand to gain immensely as the market spreads beyond legitimate collectors to "investors." Inflation, too, plays a role. As paper money becomes less and less valuable, people rush to put their money into *anything* that they perceive is scarce.

At any rate, the mania is spreading. Not so long ago, a 10-year-old car was worth little more than its scrap value even if it was in good running order. Not so today. The widely accepted theory now is that a car depreciates rapidly, falling close to zero in ten years, but then picking up again when it is ten or 12 years old. After that, the older the better. Thus, for example, a 1953 Buick Skylark that was only worth $315 in 1960 was worth as much as $2,000 last year.

But it's not so simple. To get top dollar, a car must be, as closely as possible, in its original condition. Restoring it to that condition can cost a fortune. "Recently I saw a V-16 Caddy that wasn't worth $2,000," says Dean Kruse. "It was rusty, the windows were busted and the engine hadn't been run in 30 years. Restored, the car might be worth $50,000 to $80,000. But to get the job done will cost $20,000. Maybe more, if it could be done at all."

But what about those cars tucked away in some barn? Aren't they worth buying and restoring? It depends. Look at what happened to Pan Am engineer Robert Whelihan, who has four old cars spread out all over his yard in Wilton, Conn. Not long ago Whelihan found one of those cars in a barn. In the black of night he went to see it and was told it was an extremely valuable 1933 Pierce-Arrow. In the light of day it turned out to be a not so valuable rusted, torn and tattered 1935 Pierce-Arrow worth exactly what it cost him; around $2,000. Restoring it will cost at least $10,000. Insurance and storage could cost another few thousand dollars, which doesn't leave much room for profit. Restored, in a few years it may be worth $15,000.

The fact is, most old cars worth investing in are already in top shape and expensive. The best of the lot are classics, less than 100 distinctively styled and engineered models dating from 1925 to 1948. In each of the past five years the price of most classics has increased at least 20%.

Also soaring in value are already restored antiques, cars that are at least 45 years old. These include some Packards, both the Model T and Model A Fords and vehicles from before 1913, called the "brass era" because the cars were equipped with brass lanterns and fittings. The least valuable cars and the easiest to find are milestone cars, those built between 1945 and 1964. Not all models qualify as milestones, and not all milestones are good money-makers. John R. Olson, the current president of the Milestone Car Society and author of the book *Making Money Owning Your Own Car*, owned a 1948 Jeepster, a milestone car, for two years. He sold it for

$1,600, exactly what it cost him to buy and maintain the car.

How far can the craze go? Who can say? The Dutch tulip bulb mania in the 17th century was the prototype of such irrational booms. Some professionals are already licking their chops over prospects for the next round of higher prices. Jim Southard, a former Atlanta stockbroker turned auto collector-dealer, is readying investment programs in classic cars for profit-sharing and pension plans. His strategy is to sell such programs to groups of doctors, lawyers and corporations. They will get the appreciating value of the car and he will get a management fee and possibly even storage fees. "Investing in cars is just like buying stocks, except you don't have the downside risk," argues Southard. "You buy the highest quality, where demand is greatest and supply is small. The value of those cars never goes down, so you're guaranteed to make money." If he made claims like that for stocks, Southard would be in the soup. But there is no Securities & Exchange Commission for classic cars.

Hottest Cars Around

Model Year	1969 Price	1971 Price	1973-74 Price	1976-77 Estimated Price
Classic Cars				
1925 Rolls-Royce roadster	$ 2,500	$16,000	$ 37,500	$ 64,800
1926 Isolta-Fraschini roadster	10,000	18,000	60,000	103,680
1928 Auburn Boat-Tail speedster	9,500	14,000	42,000	72,576
1929 Duesenberg phaeton	30,000	75,000	205,000	354,240
1929-33 Duesenberg roadster	28,000	48,000	125,000	216,000
1931 Cadillac V-16 convert.	19,500	24,500	57,000	98,496
1933 Stutz DV 32 convert.	5,200	17,700	35,000	60,480
1934 Bugatti convert. (type 57)	11,000	14,500	35,000	60,480
1934 Packard D.C. phaeton	15,000	30,000	45,000	77,760
1937 Horch convert.	5,000	7,000	20,000	34,560
Not So Classic Cars				
1948 Chrysler Town & Country convert.	$ 1,600	$ 2,600	$ 9,500	$ 14,449
1951 Ford convert. (V-8)	600	1,000	2,150	3,270
1953 Studebaker Starliner hardtop	650	800	2,400	3,650
1954 Chevrolet Corvette	2,250	3,800	4,800	7,300
1955 Ford Thunderbird	2,500	3,500	5,200	7,909
1956 Lincoln Mark II	3,300	3,800	6,000	9,125
1958 Cadillac Eldorado brougham	3,200	3,200	4,200	6,388
1963 Buick Riviera	1,070	800	2,750	4,182
1964 Studebaker Avanti	2,800	2,800	5,100	7,757
1966 Oldsmobile Toronado	2,370	1,425	1,800	2,738

Source: Old Car Value Guides and Classic Car Investments.

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1726

JAMES H. SOUTHARD and CLASSIC CAR INVESTMENTS, INC.,
Petitioners,

vs.

FORBES, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TENNYSON SCHAD
Suite 1929
30 Rockefeller Plaza
New York, New York 10020
(212) 582-3293

KIRK M. McALPIN
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

C. DAVID VAUGHAN
909 Peachtree Center Cain Tower
229 Peachtree Street
Atlanta, Georgia 30303
(404) 588-1115

Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3930

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Respondent, Forbes, Inc., submits this brief in opposition to the petition of James H. Southard and Classic Car Investments, Inc., for the Writ of Certiorari, and, for the reasons set forth herein, respectfully urges the Court to deny the Writ.

I. PRELIMINARY STATEMENT

In accordance with Rule 40(3) of the Supreme Court Rules, Respondent accepts the preliminary portions of the petition (pp. 1-4) with the following exceptions:

(1) Respondent notes that the petition omits any reference to the basis for the lower courts' jurisdiction in this action, as required by Rule 23(1)(g). Jurisdiction was predicated upon diversity of citizenship pursuant to 28 U.S.C. § 1332, and the claim based upon the defamation laws of the State of Georgia. Although federal questions, specifically defenses under the First Amendment to the United States Constitution, were raised by Respondent, Petitioners' claims are not based upon any right recognized by federal law, and the constitutional defenses of Respondent were never addressed by either the District Court or the Court of Appeals.[1]

(2) Respondent further submits that portions of Petitioners' "Statement of the Case" (pp. 3-4) are argumentative in their description of the subject article and the Circuit Court's decision. Instead of challenging these argumentative statements directly, Respondent respectfully calls the Court's attention to the article and decision themselves, which are reproduced in Appendices E and B, respectively, to the petition.

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1. "Inasmuch as the court has found no defamatory meaning in the complained of provisions, there is no need to consider whether the plaintiffs or either of them is a public figure within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), or whether any error made in the article was the result of negligence or actual malice." District Court Order, at page 19a of Petitioners' Appendix. *See also* Circuit Court Opinion, note 9, at pages 7a-8a of Petitioners' Appendix.

II. ARGUMENT AND CITATION OF AUTHORITY

For the following reasons, Respondent respectfully submits that the Writ should be denied:

A. The Decisions Below Are Not in Conflict with State Law

Contrary to Petitioners' suggestion (Petition, pp. 5-7), neither the District Court's nor the Circuit Court's decision conflicts, in any way, with the applicable laws of the State of Georgia. The decisions of the Georgia courts, cited by Petitioners and relied upon by them as controlling authority, are in complete accord with the result in this action. Indeed, the Court of Appeals relied upon those very same decisions in reaching its result.[2]

It is well settled in Georgia that the question of libel by innuendo is submitted to the jury only where the publication is ambiguous, where it is reasonably capable of two interpretations, *and* where one of those interpretations is defamatory. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973) (applying Georgia law), *cert. denied*, 415 U.S. 985 (1974); *Central of Georgia Railway Co.* v. *Sheftall*, 118 Ga. 865, 45 S.E. 687 (1903); *Holmes* v. *Clisby*, 118 Ga. 820, 45 S.E. 684 (1903). The rule in Georgia is in complete harmony with the generally accepted principle that it is for the court to determine whether a publication bears a defamatory meaning; if it does not, there is nothing for a jury to decide. *See* RESTATEMENT (SECOND) OF TORTS § 614.

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2. *See* Circuit Court Opinion at pages 5a and 7a of Petitioners' Appendix.

The courts below did not conclude that a defamation plaintiff is not entitled to a jury determination of whether an ambiguous publication is libelous, but merely that the publication here in question is unambiguous. Therefore, the question of whether the unambiguous statement is defamatory or non-defamatory is for the court. That the result in this case may differ from conclusions reached in other Georgia decisions is attributable not to the application of different legal principles but to the application of the same principles to different publications.

B. The Decisions Below Are Not Inconsistent with This Court's Prior Decisions

Petitioners next contend that the lower courts' decisions are inconsistent with this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Petition, pp. 7-9. Respondent respectfully submits that this contention is untenable for two reasons.

First, the *Gertz* case dealt specifically with the question of whether the defendant was entitled to the constitutional protection recognized in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), where the plaintiff was a private individual and not a public figure in the context of the alleged libel. In the present case, the District Court expressly declined to consider, and the Court of Appeals did not determine, whether Petitioners are public figures or whether the subject article is entitled to constitutional protection.[3] Accordingly, it is inconceivable that the result here could be inconsistent with this Court's holding in *Gertz*.

Second, as Petitioners correctly note, the *Gertz* decision involved, in broader terms, the proper balance between the individual right to protection of reputation, as recognized by state law, and the freedom of the press, as guaranteed by the First Amendment. To the extent that *Gertz* might be said to swing the pendulum away from increasing protection for the press to a greater emphasis upon state defamation law, the result here is in complete accord: the courts below never considered or decided whether the subject article is entitled to First Amendment protection and decided the case, instead, on the basis of, and in complete harmony with, clearly established and long recognized principles of Georgia's law of defamation.[4]

3. *See* footnote 1, *supra* at p. 2.

C. The Case Does Not Involve Any Unsettled Federal Question

Petitioners further contend that the *Gertz* decision expressly reserves the question of what standards should be applied in a case of alleged libel by innuendo and urge the Court to grant the Writ to "resolve the issue left undecided". Petition, p. 9. We respectfully submit that these Petitioners, who allege libel by innuendo, are in no position to obtain relief in the resolution of this issue. If different standards are appropriate, an ambiguous publication should be afforded greater protection since it does "not warn a reasonably prudent editor or broadcaster of its defamatory potential". 418 U.S. 323, 348.

More important, the question of whether the subject article is constitutionally privileged has never been considered or decided in this case. Whether an article which is allegedly defamatory by innuendo is entitled to a different standard or degree of constitutional protection is clearly not an appropriate question for consideration at

4. *See, e.g.*, cases cited *supra* at p. 3.

a stage of the proceedings where constitutional protection is not even in issue.[5]

D. There Are Additional Reasons for Denying the Writ

In addition to the foregoing, Respondent respectfully submits that there are additional reasons why the Writ should be denied. First, this is not a case of far-reaching implications. It deals with a particular publication and the application of well established and undisputed legal principles to that publication.

Second, both the District Court and the Court of Appeals gave complete consideration to the Petitioners' contention that they were defamed by the subject article and decided the question correctly and in full accord with controlling Georgia law. We respectfully submit that the Writ should be denied in that there is no reason why the case warrants this Court's attention or why the conclusion of the lower courts should be re-examined.

Finally, the case does not present any significant federal question, notwithstanding Petitioners' final effort to create one at this stage of the proceedings by their argument that implementation of summary judgment procedures denied them a right to jury trial guaranteed by the Seventh Amendment. Even if the argument had been raised and considered below (and it was not), it is patently untenable. The granting of summary judgment requires the finding that there is no material issue of fact and, accordingly, that there is nothing for a jury to decide. The courts below did not usurp the jury's function but found that the alleged libel was not defamatory *as a matter of law*, in accordance with well established principles of Georgia's law of libel.

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5. *See* footnote 1, *supra*, at p. 2.

III. CONCLUSION

For these reasons, Respondent, Forbes, Inc., respectfully submits that the petition should be rejected and the Writ denied.

Respectfully submitted,

KIRK M. MCALPIN
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

C. DAVID VAUGHAN
909 Peachtree Center Cain Tower
229 Peachtree Street
Atlanta, Georgia 30303
(404) 588-1115

TENNYSON SCHAD
Suite 1929
30 Rockefeller Plaza
New York, New York 10020
(212) 582-3293

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have made due and legal service of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon Petitioners by mailing three printed copies thereof to Petitioners' counsel of record,

Joseph R. Manning
David W. Porter
Morris, Manning & Brown
Suite 2150
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

by depositing said copies in the United States mail properly addressed, with sufficient postage affixed thereto.

This 30th day of May, 1979.

KIRK M. MCALPIN
Lead Counsel for Respondent and a Member of the Bar of This Court